FILE COPY

Office Supreme Court,
FILED
JAN 23 193
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 663

JOHN A. SNYDER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, WHICH AFFIRMED AN ORDER OF THE BOARD OF TAX APPEALS.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

HENRY M. WARD,
Counsel for Petitioner,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
PETITION	1-6
JURISDICTION	2
QUESTIONS PRESENTED	2-3
STATEMENT	3-4
REASONS FOR GRANTING CERTIORARI	4-6
BRIEF IN SUPPORT OF PETITION	7-30
OPINIONS BELOW REPORTED	7
STATEMENT	7-10
ERRORS RELIED ON	10-11
SUMMARY OF ARGUMENT	11-13
ARGUMENT	13-25
FIRST POINT:	
THE DECISIONS OF THIS COURT REQUIRE THAT INCOME TAX SHOULD BE COMPUTED IN THE FIRST INSTANCE WITH RESPECT TO TRANSACTIONS OF PURCHASE AND SALE CONSUMMATED WITHIN THE TAX YEAR, WITHOUT REFERENCE TO PURCHASES IN EARLIER YEARS	13
SECOND POINT:	
PETITIONER'S TRANSACTIONS ON THE STOCK EXCHANGE CONSTITUTED A TRADE OR BUSINESS WITHIN THE MEANING OF SECTION 22 OF THE REVENUE ACT OF 1928	14-15
THIRD POINT:	
THE EXTENSION IN THE INSTANT CASE, OF THE RULE OF "FIRST IN FIRST OUT" TO PURCHASES IN PRIOR YEARS IS NOT AUTHORIZED BY THE REVENUE ACT OF 1928, AND IS, THEREFORE, BEYOND THE POWER OF THE COMMISSIONER	16-18
FOURTH POINT:	
IT WAS IMPOSSIBLE TO IDENTIFY ANY OF THE SHARES SOLD. HENCE THE REGULATION CANNOT WITH REASON BE APPLIED TO TRANSACTIONS OF THIS NATURE	18-21
FIFTH POINT:	
THE REGULATION IS BEYOND THE POWER OF THE COMMISSION IN ITS APPLICATION TO THE INSTANT CASE, IN THAT IT ESTABLISHES AN IRREBUTTABLE PRESUMPTION OF FACT	21-23

SIXTH POINT: Page

THERE IS A CONFLICT BETWEEN THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN THE INSTANT CASE AND THAT OF THE FOURTH CIRCUIT IN *Howbert v. Penrose*, 38 FED. (2d) 577, 578, ON THE VITAL POINT INVOLVED, THAT THE INTENTION OF THE TAXPAYER IS CONTROLLING 23-24

SEVENTH POINT:

THE EVIDENCE OF PETITIONER'S INTENTION IS UNCONTRADICTED AND IS CORROBORATED BY THE TRANSACTIONS SET OUT IN THE RECORD. IT MUST, THEREFORE, PREVAIL OVER THE REGULATION 24

Appendix A, analysis of petitioner's transactions ... 26-29
Appendix B, computation of tax on operations of tax year 30

TABLE OF CASES.

Bailey v. Alabama, 219 U. S. 219, 238 ..... 5, 12, 23
Burnet v. Sanford & Brooks Co., 282 U. S. 359 .. 11, 13, 15, 17
Chesapeake & Ohio R. R. Co. v. Martin, 283 U. S. 209 ..... 13, 24
Chicago Ry. & Equipment Co. v. Blair, 20 Fed. (2d) .. 13, 24
Direction der Disconto Gesellschaft v. U. S. Steel Corp. 12
Flint v. Stone Tracy Co. 12, 15
Heiner v. Donnan, 285 U. S. 312 ..... 3, 5, 12, 21, 22
Howbert v. Penrose, 38 Fed. (2d) 577 ..... 5, 22
Manley v. Georgia, 279 U. S. 1 ..... 5, 12, 22
Mobile & J. K. R. R. Co. v. Turnipseed, 219 U. S. 35 ..... 5, 13, 24, 25
Morse v. United States, 270 U. S. 151 2
Richardson v. Shaw, 209 U. S. 365 ..... 12, 20
Schurin v. Commissioner, 9 B. T. A. 1304 12
Washburn v. Commissioner, 51 Fed. (2d) 949 12
Western Atlantic R. Co. v. Henderson, 279 U. S. 639 .. 12
Woolford Realty Co. v. Rose, 288 U. S. 319 ..... 11, 13, 17

STATUTES ETC. CITED.

Revenue Act of 1928 (45 Stat. 791) 16-17
Regulations 74, Article 58 ..... 2, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. ....

JOHN A. SNYDER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, WHICH AFFIRMED AN ORDER OF THE BOARD OF TAX APPEALS.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

John A. Snyder, the petitioner above named, by his counsel, respectfully shows to the Court:

JURISDICTION

The jurisdiction of this Court to entertain this proceeding and grant the application is conferred by Section 1003(a) of the Revenue Act of 1926; Chap. 27; 44 Stat. 9, 110; U. S. C. Tit. 26, Sec. 1226. The Circuit Court of Appeals for the Third Circuit affirmed the order of the Board of Tax Appeals September 18th, 1934 (R. 57). Petitioner applied for a rehearing, which was denied October 24, 1934 (R. 69). This petition is filed within three months from the date of entry of the order denying the petition for rehearing. *Morse v. United States*, 270 U. S. 151, 154.

OPINIONS BELOW

The findings and opinion of the Board of Tax Appeals (R. 32-35) are reported in 29 B. T. A. 39. The opinion of the Circuit Court of Appeals (R. 49-56) is reported in 73 Fed. (2d) 5.

QUESTIONS PRESENTED

The applicability, and if applicable, the power of the Commissioner of Internal Revenue to enforce, with respect to the instant case, for the tax year 1928, the rule known as "first in first out" prescribed by Article 58 of Regulations 74 (R. 34) reading as follows:

> "When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale over the cost or other basis of the stock will constitute gain."

IT IS CONTENDED BY PETITIONER:

(1) That where, as in the instant case, the transactions constitute a trade or business of the taxpayer, and more shares are bought during the tax year than are sold, the Revenue Act of 1926, as construed by this Court, requires

that the results of the transactions during the year, whether resulting in gain or loss shall first be determined. Hence that in applying the rule the transactions for the tax year only should be considered, without regard to transactions in prior years.

(2) That the effect of this regulation, under the decisions of the Circuit Court of Appeals and Board of Tax Appeals in the instant case is to establish an irrebuttable presumption of fact, contrary to the principles stated by this Court in *Heiner v. Donnan*, 285 U. S. 312, and in the decisions of this Court on which that case was based.

(3) That, if the regulation be regarded as merely raising a prima facie inference of fact, this inference was at an end when petitioner proved facts to the contrary.

STATEMENT

These questions arise upon the following facts:

The Petitioner throughout the year 1928 was engaged in operating in the stock market on margin by the method as "pyramiding;" his accounts being carried by two brokerage houses in Philadelphia All the transactions of purchase and sale were in shares of stock of the same corporation, United Gas & Improvement Company, of Philadelphia, commonly known and referred to herein for brevity as "U. G. I." (R. 6-9)* All the purchases and sales were in the form of "street certificates" which are certificates for 100 shares of stock standing in the name of some firm of stockbrokers, members of the Stock Exchange, endorsed in blank. They pass in the "street" with the freedom of currency. (R. 12.)

During the year 1928 in a continuous series of transactions the petitioner, through his brokers, bought 10,600 shares of U.G.I. at a total cost of $1,504,637.50 and sold 7,900 shares for $1,095,304.50. His holdings of U.G.I. stock were thus increased in that year by 2,700 shares. (R. 25-

*Except as otherwise noted, all the allegations of fact in the petition to the Board of Tax Appeals (R. 4-28) are admitted in the answer (R. 29-31). References to the petition only, refer to admitted allegations.

28; *Schedules;* R. 8.) There were 73 transactions of purchase and 50 of sale (R. 25-28).

On the year's transactions petitioner realized an actual profit of about $43,682** on which the tax is $1,897.77. His unrealized "paper profit" (the difference between cost and market value at the end of the year, assumed to be 160) was about $239,500. (Schedules, R. 25-28.)

The allegation that these operations constituted a trade or business (R. 10) is denied (R. 30). It was proved by petitioner's statement received in lieu of evidence (R. 44) and by the schedules of transactions (R. 25-28), showing the volume of the transactions. Under the authorities cited in the supporting brief, these transactions constituted a trade or business.

DETERMINATION OF COMMISSIONER OF INTERNAL REVENUE, BOARD OF TAX APPEALS AND CIRCUIT COURT OF APPEALS.

The Commissioner held that the profit realized during the year *1928* should be determined by deducting from the sales price *realized in that year* the cost of equivalent amounts of shares of U.G.I. stock *acquired in prior years,* wholly without regard to the segregated transactions for the tax year involved. By this method the Commissioner computed the taxable profit on these sales at $192,143.25, nearly 90 per cent of the unrealized "paper profit." (R. 22.)

The action of the Commissioner was upheld by the Board of Tax Appeals (R. 35). The order of the Board was affirmed by the Circuit Court of Appeals (R. 57).

REASONS FOR GRANTING CERTIORARI:

(1) The case presents important questions of Federal Income Tax law which have not been, but should be, settled by this Court, namely,

---

**See Appendix B to supporting brief, p. 30, where the tax is calculated from the schedules (R. 25-28).

(a) Whether, where a taxpayer is engaged in the trade or business of trading on the stock exchange, the transactions in the tax year should be segregated and the tax computed on the year's transactions without recourse to prior years.

(b) Whether as applied to such transactions the regulation, approved and enforced by the Court below, is authorized by the Revenue Act of 1928 and other Revenue Acts as construed by this Court.

(c) Whether the Commissioner of Internal Revenue has the power to establish by regulation an irrebuttable presumption of fact which overcomes the only evidence available to taxpayers in similar situations, namely the intention to sell the certificates bought in the tax year and not those bought in prior years.

(2) There is a conflict between the Circuit Court of Appeals for the Third Circuit in the instant case, and the Circuit Court of Appeals for the Fourth Circuit in *Howbert v. Penrose*, 38 Fed. 2d, 577, 578, with regard to the right of the taxpayer to carry out his intention and decision to sell the last acquired shares first.

(3) The Circuit Court of Appeals has decided a Federal question in the instant case, namely the power of the Commissioner of Internal Revenue to establish by regulation an irrebuttable presumption of fact, in a way probably in conflict with applicable decisions of this Court, namely: *Bailey v. Alabama*, 219 U. S. 219, 238; *Manley v. Georgia*, 279 U. S. 1; *Heiner v. Donnan*, 285 U. S. 312, 326, 329; *Mobile & J. K. R. R. Co., v. Turnipseed*, 219 U. S. 35, 41.

The importance of these questions, is emphasized in the Government's petition for certiorari in a parallel case in which the same regulation is involved, No. 582, *Helvering v. Rankin*, now *sub judice*. (Petition filed December 18, Respondent's brief filed January 17.) In that case it is stated in the petition for the writ as follows (pp. 9-10):

"The court below sought to make a distinction between a sale of certificates and a sale of shares. See

also the second *Snyder case, supra*. (The instant case, 73 Fed. (2d) 5). It recognizes that in marginal transactions *certificates cannot be identified*, but holds that *shares, as distinguished from certificates*, are capable of identification. *This so-called distinction does not exist.*"

"The decision below deals with a class of transactions in which a large number of taxpayers engage. * * * Marginal transactions are of common and frequent occurrence. * * * The Treasury Department advises that a large number of cases of this character are now pending in the Bureau. * * * It is important in the administration of the revenue that the proper method of computing gains and losses on this type of transaction should be settled. * * * *It is important*, therefore, *that this Court pass* upon this case and *establish rules to guide the Government and taxpayers* in future cases of this character." (Italics supplied)

It is suggested that the petitions in No. 582 and in the instant case be granted and the two cases heard on the same day.

WHEREFORE, petitioner prays that a writ of certiorari be granted.

HENRY M. WARD,
Counsel for Petitioner,
Washington, D. C.

January 21st, 1935.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Board of Tax Appeals, 29 B. T. A. 39.
Circuit Court of Appeals, 73 Fed. (2d) 5.

JURISDICTION

The jurisdiction is fully stated in the petition, page 2.

STATEMENT

Petitioner throughout the year 1928 was trading on the Philadelphia Stock Exchange. All his transactions were confined to purchases and sales of shares of stock of United Gas & Improvement Company, of Philadelphia, referred to throughout for brevity as "U.G.I." He carried on his operations through two stock exchange houses in Philadelphia. The operations were on margin accounts and additional shares were bought from time to time continuously during the tax year by the method known as "pyramiding." That is to say, the brokers carried several thousand shares of U.G.I. to petitioner's credit and a cash debit of several hundred thousand dollars for the amounts advanced to make the purchases. Petitioner was credited with dividends from time to time and debited with interest on the current cash debit balances. The market was rising throughout the year with occasional relapses. The brokers, as customary, required that the cash debit balance should not exceed at any time 70 per cent of the current daily market quotations of the shares to petitioner's credit. In other words, the brokers required a 30 per cent "margin." (R. 10-11.)

Whenever the cash debit balance exceeded 70 per cent of current quotations the brokers required petitioner either to deposit sufficient cash or securities or to sell sufficient of the shares to his credit to restore his margin. In every in-

stance in the tax year petitioner, for this express purpose, sold a sufficient number of shares of U.G.I. (R. 11, 45.)

Thereafter, on a rising market he bought back an equal or greater number of shares. (R. 9, 15.)

Petitioner's object throughout the year was *to accumulate as many shares of U.G.I. as he could.* (R. 9, 15.) He did not intend or attempt at any time to realize a profit on shares bought in prior years, but intended in every instance of sale in 1928 to sell the shares last bought, the purchase of which had overloaded his account and brought about the requirement for more margin. (R. 10; denied, proved by statement, R. 44.)

On this basis of trading in earlier years petitioner had to his credit January 1, 1928, with the two brokers, 5300 shares of U.G.I. stock bought in prior years and a debit cash balance of $501,866.59. (R. 7, 8, 25, 27.) During the tax year the brokers bought on his order 10,600 additional shares at a total cost of $1,504,637.50 and sold 7,900 shares for $1,095,304.50 (Schedules, R. 25-28). Consequently petitioner had to his credit at the end of the tax year 8,000 shares (an increase of 2,700) and a cash debit balance of $932,822.67 (an increase of $430,956.08).

The operations for the tax year 1928 showed an actual profit of about $43,682 and a tax liability of $1,897.77.* The Commissioner of Internal Revenue, by taking the purchase prices of equal amounts of shares *in prior years* and the *sales prices in 1928,* computed a taxable profit of $192,143.25, on which he computed a deficiency tax of $38,961.22. (R. 22.)

This profit nearly equalled the unrealized paper profit on the year's transactions.

This result was reached by applying the rule of "first in first out" established by Article 58 Regulations 74, which reads as follows:

---

*This is an arithmetical computation from the schedules in evidence (R. 25-28) and is stated in detail below. (Appendix B, p. 30.)

> "When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale over the cost or other basis of the stock will constitute gain." (R. 34.)

While the Board of Tax Appeals found certain of the facts, substantially all the facts are admitted in the answer to the amended petition before the Board (Petition, R. 6-17, 19; Schedules, R. 25-28; Answer, R. 25-31). These admitted facts supplement and control the facts found by the Board.

The respondent denied that the petitioner was engaged in any trade or business other than that of secretary of an insurance company and denied that the brokerage accounts constituted a trade or business within the meaning of any provision of the Revenue Act of 1928 (R. 29, par. V). The accuracy of the schedules, showing the transactions in detail, was admitted (Petn. par. XX, R. 19; Schedules R. 25-28; Answer, par. XX, R. 31).

The Court of Appeals held that these transactions did not constitute a "trade or business." (R. 56) The court, however, stated that the allegation that petitioner "was engaged in a business regularly carried on for profit" was covered by the stipulation at the hearing that if the petitioner were present he would testify to its substance. (R. 55.) The court below also held that this is a mixed question of fact and law. (R. 56.) The conclusion that the operations constituted a trade or business is self-evident and follows from the conceded fact that the transactions were continuous throughout the year and involved the purchase of over 10,000 shares at a cost of over a million and a half dollars and sales of 7,900 shares at a price of over a million dollars.

Petitioner was prevented by illness from giving oral tes-

timony. His statement was received in lieu of evidence. (R. 43-46.)

This statement clearly proves his intention to increase his holdings of U.G.I. (R. 45, par. XIX) and to sell the shares the purchase of which, with a fall in daily quotations had impaired his margin (R. 44-45) and to buy back the same, or a greater number of shares, when market conditions permitted. In every instance the petitioner bought back an equal or greater number of shares within a few days (*Schedules*, R. pp. 25-28. Analysis of Schedules, Appendix A, *infra*, pp. 26-29.)

The repurchase of shares, which was continuous throughout the tax year, completely negatives the theory that petitioner was selling the shares acquired in prior years or doing anything else than strengthening his "long" position on the market as is fully proved by his statement (R. 45-46, par. XIX).

ERRORS RELIED ON

The Court below erred:

1. In holding (R. 51) that the principle stated in *Heiner v. Donnan*, 285 U. S. 312, applies only to *conclusive* statutory presumptions; whereas, as clearly appears from the opinion and cited decisions of this Court on which it is based, the principle applies equally to presumptions which, although not in form conclusive, are *in fact* irrebuttable and, therefore, are *in effect* conclusive.

2. In holding (R. 51) that, upon the facts admitted in the pleadings, in the customary course of dealings between stockbrokers and their customers (R. 11-17, pars. XI-XVI):

> "The taxpayer is given every opportunity to identify the shares he has sold and to prove his loss or gain accordingly."

Whereas, as clearly appears from the admitted facts cited, it is not possible to identify any particular shares or certificates in the customary trading operations on the stock exchange on margin accounts.

3. In holding (R. 53-55) that the regulation of "first in first out" applies to "shares of stock in a corporation" and not to *the certificates* of shares, in which alone the dealings were had, and that by giving orders to his "brokers to sell from any particular lot" he would have supplied the necessary identification, whereas upon the conceded facts (R. 14, pars. XII-XIII) the broker would have been under no obligation whatever to sell any particular shares (or certificates) from any particular lot.

4. In holding (R. 53) that upon the conceded facts the brokers were selling, not stock certificates but "shares" owned by petitioner, whereas in every instance "street certificates" were bought and sold, the petitioner did not have title to any particular shares, was not a stockholder, and his only right was to call upon the brokers for the delivery of certificates for so many shares upon paying in cash, or other value, the aliquot debit balance on the broker's books. Petitioner's rights did not in the tax year, ripen into possession or actual ownership of any specified certificates or shares.

5. In holding (R. 58-59) that the volume of the transactions with other evidence did not establish as a conclusion of law that petitioner's operations on the stock exchange constituted a trade or business.

SUMMARY OF ARGUMENT

FIRST: THE DECISIONS OF THIS COURT REQUIRE THAT INCOME TAX SHOULD BE COMPUTED IN THE FIRST INSTANCE WITH RESPECT TO TRANSACTIONS OF PURCHASE AND SALE CONSUMMATED WITHIN THE TAX YEAR, WITHOUT REFERENCE TO PURCHASES IN EARLIER YEARS. (p. 13.)

Burnet v. Sanford & Brooks Co., 282 U. S. 359.
Woolford Realty Co. v. Rose, 288 U. S. 319.

SECOND: PETITIONER'S TRANSACTIONS ON THE STOCK EXCHANGE CONSTITUTED A TRADE OR BUSINESS WITHIN THE MEANING OF SECTION 22 OF THE REVENUE ACT OF 1928. (p. 14.)

Flint v. Stone Tracy Co., 220 U. S. 127, 171.
Washburn v. Commissioner, 51 Fed. (2d) 949 (C. C. A. 8th) and cases cited.
Schwinn v. Commissioner, 9 B. T. A. 1304.

THIRD: THE EXTENSION IN THE INSTANT CASE OF THE RULE OF "FIRST IN FIRST OUT" TO PURCHASES IN PRIOR YEARS IS NOT AUTHORIZED BY THE REVENUE ACT OF 1928 AND IS, THEREFORE, BEYOND THE POWER OF THE COMMISSIONER. (p. 16.)

FOURTH: IT WAS IMPOSSIBLE TO IDENTIFY ANY OF THE SHARES SOLD. HENCE THE REGULATION CANNOT WITH REASON BE APPLIED TO TRANSACTIONS OF THIS NATURE. (p. 18.)

Richardson v. Shaw, 209 U. S. 365, 378-379.
Direction der Disconto Gesellschaft v. United States Steel Corporation, 267 U. S. 22, 28.

FIFTH: THE REGULATION IS BEYOND THE POWER OF THE COMMISSIONER IN ITS APPLICATION TO THE INSTANT CASE IN THAT IT ESTABLISHES AN IRREBUTTABLE PRESUMPTION OF FACT. (p. 21.)

Heiner v. Donnan, 285 U. S. 312, 328.
Manley v. Georgia, 279 U. S. 1, 8.
Western Atlantic R. Co. v. Henderson, 279 U. S. 639, 642.
Bailey v. Alabama, 219 U. S. 219, 238.

SIXTH: THERE IS A CONFLICT BETWEEN THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN THE INSTANT CASE AND THAT OF THE FOURTH CIRCUIT IN *Howbert v. Penrose*, 38 Fed. (2d) 577, 578, ON THE VITAL POINT INVOLVED THAT THE INTENTION OF THE TAXPAYER IS CONTROLLING. (p. 23.)

SEVENTH: THE EVIDENCE OF PETITIONER'S INTENTION IS UNCONTRADICTED AND IS CORROBORATED BY THE TRANSACTIONS SET OUT IN THE RECORD. IT MUST, THEREFORE, PREVAIL OVER THE REGULATION. (p. 24.)

Chesapeake & Ohio R. R. Co. v. Martin, 283 U. S. 209, 215, 216.
Chicago Ry. Equipment Co. v. Blair, 20 Fed. (2d) 10, 12 (C. C. A. 7th).
Mobile J. & K. R. R. Co. v. Turnipseed, 219 U. S. 35, 41.

CONCLUSION: THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE GRANTED. (p. 25.)

FIRST.

THE DECISIONS OF THIS COURT REQUIRE THAT INCOME TAX SHOULD BE COMPUTED IN THE FIRST INSTANCE WITH RESPECT TO TRANSACTIONS OF PURCHASE AND SALE CONSUMMATED WITHIN THE TAX YEAR, WITHOUT REFERENCE TO PURCHASES IN EARLIER YEARS.

Burnet v. Sanford & Brooks Co., 282 U. S. 359, is the converse of the instant case. In that case the taxpayer (on a cash basis) in 1920, recovered a judgment for $192,577.59 against the United States on certain dredging contracts, which it had performed at a heavy loss in prior years. From this amount the taxpayer deducted the prior losses and returned the balance as taxable income. The Commissioner held the entire amount was taxable income. So did the Board. The Fourth Circuit Court of Appeals sustained the deductions claimed by the taxpayer (35 Fed. (2d) 312).

This Court reversed the Court of Appeals and sustained the Commissioner. At page 363 the opinion by Mr. Justice Stone reads:

> "All the revenue acts which have been enacted since the Sixteenth Amendment *have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period*, either the calendar year, or at the option of the taxpayer, the particular fiscal year which he may adopt."*

See also to same effect:

Woolford Realty Co. v. Rose, 288 U. S. 319, 326.

*Italics supplied throughout unless otherwise noted.

SECOND.

PETITIONER'S TRANSACTIONS ON THE STOCK EXCHANGE CONSTITUTED A TRADE OR BUSINESS WITHIN THE MEANING OF SECTION 22 OF THE REVENUE ACT OF 1928.

Petitioner's operations on the exchange were continuous throughout the greater part of the tax year. They are stated in detail in Schedules B and C attached to the petition before the B. T. A. (R. 25-28, and in the analysis of those schedules, Appendix A, *infra*, pp. 26-29).

During the tax year petitioner bought through two brokers 10,600 shares of U. G. I. at a cost of $1,504,637.50. He sold 7,900 shares for $1,095,304.50. His long share credit balance was increased, pursuant to his intention to accumulate U. G. I. on a rising market, from 5,000 to 8,000 an increase of 2,700 shares. His debit cash balance was increased from $501,866.59 to $932,822.57, an increase of $430,956.08 (*Schedules*, R. 25-28). In all there were 73 transactions of purchase and 50 of sale, in lots varying from 100 to 1,000 shares at a time, the great bulk in lots of 100. All transactions were in the form of "street certificates;" that is to say, certificates for 100 shares each, in the name of a stock exchange firm, endorsed in blank (R. 12, 14).

Petitioner undertook these operations for profit (R. 6, 17, 19) in order to accumulate as many shares as he could on a rising market using his paper profit as margin (*Ibid.*).

He clearly was not an investor, buying securities outright to derive income from them. All the transactions were speculative and obviously required constant attention to the brokers' requirements for more margin (R. 9-11), and to the daily market fluctuations, in order that, whenever a sale was made, an equal or greater amount of shares might be bought back when permitted by market conditions (R. 10).

In every instance it was petitioner's intention to sell the last acquired stock first (R. 11, 44-45). To sell the stock, the purchase of which had brought about the occasion for and requirement of the sale (*Ibid*).

Under these circumstances it seems clear that within the commonly accepted meaning of the terms "business" and "trade" these operations constituted both. Similar operations are commonly known as "*trading*" on the stock exchange.

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171, the opinion quotes with approval the definition of "business" in Bouvier's Law Dictionary, 372, as follows:

> "That which occupies the time, attention and labor of men for the purpose of livelihood or profit;"

and that in Black's Law Dictionary, 158:

> "'Business' is a very comprehensive term and embraces everything about which a person can be employed."

Petitioner is insistent upon the point that the operations constituted a trade or business, or transaction entered into for profit within the statute not in order to deduct losses, but to emphasize the controlling rule (Point First above, p. 13) that the law requires the tax to be computed on the segregated transactions of each year.

While this rule would probably be applicable if the operations did not constitute a business they are *a fortiori* applicable when business transactions are involved and the operations constitute the year's business.

The Commissioner was no more justified in holding by means of the irrebuttable presumption, established by the rule of "first in first out" that the shares sold in 1928 were those bought in prior years at a lower price, than the taxpayer (petitioner) would have been in claiming deductible losses if the shares had been bought in prior years at higher prices than those at which they were sold in 1928. See *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, *supra*.

THIRD.

THE EXTENSION IN THE INSTANT CASE, OF THE RULE OF "FIRST IN FIRST OUT" TO PURCHASES IN PRIOR YEARS IS NOT AUTHORIZED BY THE REVENUE ACT OF 1928, AND IS, THEREFORE, BEYOND THE POWER OF THE COMMISSIONER.

The Revenue Act of 1928 (45 Stat. 791) in so far as applicable reads as follows:

> "Sec. 11. (45 Stat. 795) There shall be levied, collected and paid *for each taxable year* a normal tax equal to the sum of the following:
>
> "(a) 1½ per centum of the first $4,000 of the amount of the net income in excess of the credits against net income provided in section 25, etc."
>
> "Sec. 12 (Ibid, 796) (a) Rates of surtax—There shall be levied, collected, and paid *for each taxable year upon the net income* of every individual a surtax as follows:" etc.
>
> "Sec. 21 (Ibid, 797) *Net Income.*
>
> "Net income means the gross income computed under Section 22, less the deductions allowed by Section 23.
>
> "Sec. 22. (Ibid) *Gross Income.*
>
> "(a) General definition. 'Gross income' includes gains, profits and income derived from * * * trades, businesses, * * * or sales, or dealings in property * * * growing out of the use of or interest in such property * * * of the transaction of any business carried on for gain or profit."
>
> "Sec. 23. (Ibid, 799) In computing net income there shall be allowed as deductions:—
>
> "(e) Losses by individuals. In the case of an individual, losses, sustained during the taxable year and not compensated for by insurance or otherwise.
>
> "(1) If incurred in trade or business."
>
> "(2)If incurred in any transaction entered into for profit, though not connected with any trade or business."

The words "for each taxable year" in sections 11 and 12 control the definitions of "gross income" and "net income" in sections 21, 22 and 23.

Hence the phrase in Section 22 (a):

> "Gross income includes gains, profits and income derived from trades, businesses * * * or sales or dealing in property" etc.

means the same as if written

> "Gross income includes gains, profits and income derived *for each taxable year* from trades, businesses, etc."

and the phrase in Section 23:

> "In computing net income there shall be allowed as deductions"

means the same as if written:

> "In computing net income *for each taxable year* there shall be allowed as deductions."

Hence the statute with respect to a trade or business or transaction entered into for profit, commands the taxing authority to include in "gross income" the gains and profits derived therefrom for "*each taxable year*" and to allow as deductions:

> "losses sustained *during the taxable year* if incurred in trade or business."

The statute, as emphatically held by this Court in *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, and *Woolford Realty Co. v. Rose*, 286, U. S. 319 (discussed above First Point, p. 13) requires, as stated in the latter case:

> "the computation of gains and losses on the basis of an annual accounting *for the transactions of the year.*"

Whatever application and validity the regulation may have with respect to an *investor* who has physical possession of a lot of shares acquired in different years and through some carelessness or oversight is unable to identify the shares sold in the tax year, is not the question here

presented. In such case the taxpayer is not, as here, engaged in a trade or business.

The statute does not authorize the Commissioner, in ascertaining the profits of the business "for each taxable year" to be included in gross income and the losses for the same "taxable year" to be deducted, to assume, as has been done in the instant case, that the shares sold in 1928 were those purchased in 1927, 1926, or 1925 and hence that this taxpayer, who in fact on his operations in 1928 made an actual profit of some 43,682, made an imaginary profit of over $192,000.

FOURTH.

IT WAS IMPOSSIBLE TO IDENTIFY ANY OF THE SHARES SOLD. HENCE THE REGULATION CANNOT WITH REASON BE APPLIED TO TRANSACTIONS OF THIS NATURE.

In its operation in the instant case the rule is both arbitrary and oppressive. It is conceded; (a) that all transactions of purchase and sale were in the form of street certificates for 100 shares each, in the name of some stock exchange house endorsed in blank; (b) that the identity of the certificates, and hence of the shares, bought on petitioner's orders was completely lost and such shares were at all times incapable of identification; (c) that the petitioner had no rights in any specified certificate; (d) that his only right was to require the delivery of so many shares on paying the brokers an aliquot amount of his debit balance; (d) that the broker's only obligation was at all times to have available for delivery on payment therefor certificates for the required number of shares. All these facts were in accordance with the well established and usual course of dealing on the stock exchange (R. 11-15, petition to Board, pars XI-XIII).

The facts pleaded and admitted are substantially as stated in *Richardson v. Shaw*, 209 U. S. 365, 378, 379.

In the Government's petition for certiorari in No. 582, *Helvering v. Rankin,* it is stated, referring to margin accounts (R. 6, 7):

> "Particular shares are not identifiable, because the common fund is the common property of all dealing in that stock and this common fund is in a constant state of flux. The regulation was designed to meet just such a condition and provides *for a cost basis* in these transactions where identification is impossible."

In other words (applying the above to the instant case), the Commissioner is justified in making and enforcing a regulation, the result of which, in the instant case, is to increase the tax from about $1,900 on the transactions in the tax year to over $38,000 based on purchases prior to the tax year.

The regulation when applied on a rising market over a period of years results in enormously increasing the taxes.

It is arbitrary and oppressive because it prevents a customer from dealing in the same security over a period of years. In the instant case it happened that the petitioner on January 1st, 1928, was long of U.G.I. and dealt only in U.G.I. during the tax years. His operations might have been precisely the same in 1928 had his credit balance consisted of entirely different securities. Segregating the tax-year, the only thing to be considered was whether the margin was preserved. The U.G.I. stock held on January 1st was merely collateral pledged to secure the debit balance. It might as well have been bonds or any other securities.

Had there been no U.G.I. shares to petitioner's credit on January 1st the profit or loss would necessarily have been computed on the operations in U.G.I. during the tax year. There is no reason in the instant case for an arbitrary regulation relating back to purchases in earlier years.

The Court of Appeals stated (R. 51) in discussing the validity of the regulation:

> "The taxpayer is given every opportunity *to identify the shares he has sold* and to prove his loss or gain accordingly."

In the instant case the petitioner had a well-defined plan of increasing his holdings of U.G.I. To that end he never sold without buying back an equal or greater number of shares.

Apparently the court below thought that if petitioner had made a written memorandum of his intention to sell the last acquired shares first or had given his brokers an order to that effect there would have been an identification, as in the Rankin case (No. 582).

But it is conceded in the instant case and it was held in *Richardson v. Shaw*, 209 U. S. 365 (*supra*) that the broker was under no obligation to carry out such order. All the certificates of U.G.I. were inextricably mixed, the last acquired with the first.

It follows that a memorandum, book entry or order would have been *merely evidentiary of petitioner's intention* and in the instant case would have added nothing of substance to his clear statement of this intention, corroborated by the transactions in detail (R. 44-45; 25-28).

The attempted distinction made by the Court of Appeals (R. 53) between "shares" and "certificates" is not justified by the facts and is subject to the criticism of being metaphysical. It is asserted in the Government's petition for certiorari in the *Rankin* case (No. 582) that the attempted distinction is unsound. At page 9 this petition reads:

> "The court below sought to make a distinction between a sale of certificates and a sale of shares. See also the second *Snyder case, supra.* It recognizes that in marginal transactions certificates cannot be identified, but holds that shares, as distinguished from certificates are capable of identification. *This so-called distinction does not exist.*"

Moreover the attempted distinction is inconsistent with the opinion of this Court in *Direction der Disconto Gesellschaft v. United States Steel Corporation*, 267 U. S. 22, 28.

FIFTH.

THE REGULATION IS BEYOND THE POWERS OF THE COMMISSION IN ITS APPLICATION TO THE INSTANT CASE, IN THAT IT ESTABLISHES AN IRREBUTTABLE PRESUMPTION OF FACT.

It has been shown above that the only evidence available to petitioner—or to any other taxpayer trading actively on margin accounts—was that of his intention. This evidence is corroborated by the transactions in the record—yet the Board (R. 35) and the Court of Appeals (R. 51) held that *Heiner v. Donnan*, 285 U. S. 312 is not in point, because in that case the statutory presumption was denominated "conclusive." Both the Board and the Court demoninated the rule of first in first out "rebuttable" and therefore sustained it.

It is submitted that in so ruling they wholly disregarded the reasoning of this Court and the theory upon which, as shown by the cases cited in the opinion, that case was decided.

Heiner v. Donnan, 285 U. S. 312, deals with a conclusive presumption created by a Federal taxing statute. The statute was held void because the conclusive statutory presumptions, that every gift made by a decedent within two years of death was in contemplation of death, made it impossible for the taxpayer to show by evidence that in fact the gift was not in contemplation of death. In reaching this conclusion this Court held that the restraint upon Federal legislation by the due process clause of the Fifth Amendment is the same as that upon State legislation by the Fourteenth Amendment.

On this point the opinion at page 326 reads:

> "Nor is it material that the Fourteenth Amendment was involved in the *Schlesinger* case, instead of the

Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge v. Long*, 282 U. S. 582, 596."

The ruling that the conclusive presumption was void, was based upon decisions of this Court in which *prima facie statutory presumptions in State statutes* were held to be void because *their effect was to prevent the litigant from proving the facts*—in other words these statutory presumptions were held void because *irrebuttable*, precisely the situation in the instant case.

On this point the opinion reads (p. 329):

"This court has held more than once that a statute *creating a presumption which operates to deny a fair opportunity to rebut it* violates the due process clause of the Fourteenth Amendment. For example, *Bailey v. Alabama*, 219 U. S. 238; *et seq.*; *Manley v. Georgia*, 279 U. S. 1, 5-6. 'It is apparent', this court said in the *Bailey* case (p. 239) 'that a constitutional prohibition *cannot be transgressed indirectly* by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.'"

In *Manley v. Georgia*, 279 U. S. 1, 6, the opinion reads:

"A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or *that operates to deny a fair opportunity to rebut it* violates the due process clause of the Fourteenth Amendment. *Bailey v. Alabama*, 219 U. S. 219, 233 *et seq.* *Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.*"

Followed in *Western & Atlantic R. Co. v. Henderson*, 279 U. S. 639, 642, which held to be invalid a State statute which

created a presumption of negligence against railroad companies

> "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

In *Bailey v. Alabama*, 219 U. S. 238, the opinion reads:

> "The latest expression upon this point is found in the case last cited (*Mobile, J. & K. C. R. R. Co. v. Turnipseed*, 219 U. S. 35) where the court, by Mr. Justice Lurton said: 'That a legislative presumption of one fact from another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So also it must not, *under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presented.*'"

SIXTH.

THERE IS A CONFLICT BETWEEN THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN THE INSTANT CASE AND THAT OF THE FOURTH CIRCUIT IN *Howbert v. Penrose*, 38 FED. (2D) 577, 578, ON THE VITAL POINT INVOLVED, THAT THE INTENTION OF THE TAXPAYER IS CONTROLLING.

On this point the opinion of the Court of Appeals in *Howbert v. Penrose* (p. 578) approves and quotes the opinion of the District Judge, in which it is stated:

> "Where a party has held stock for many years and later buys more, and in this case it is admitted that plaintiff bought a great deal more after 1913 than he sold in 1918, *he has a right to decide which stock he is going to sell.* The Government has not the power to say that if the taxpayer sells any of his holdings in a

particular company, *it can say conclusively that he sold the stock bought at the cheapest price* or *the shares purchased before or* after a *certain date. He has the right to decide that himself.*"

SEVENTH.

THE EVIDENCE OF PETITIONER'S INTENTION IS UNCONTRADICTED AND IS CORROBORATED BY THE TRANSACTIONS SET OUT IN THE RECORD. IT MUST, THEREFORE, PREVAIL OVER THE REGULATION.

As pointed out in the instant case the intention of the taxpayer as to whether the certificates sold are those last purchased is necessarily controlling. It is for him, and not for the Commissioner of Internal Revenue, to decide how his operations are to be carried on. In the instant case the petitioner had the primary purpose and intent throughout the tax year of accumulating as large a number of shares of U.G.I. as market conditions would permit. To this end, when he thought conditions favorable he bought. When it turned out that he had made a bad guess as to the course of the market and, consequently, through a fall in daily quotations his account was overloaded and his margin impaired, he intended to sell the certificates, the purchase of which had brought about the condition which made the sale necessary. (*Statement of Evidence*, pars. X, XIV, XIX, R. 44-46).

This evidence, though that of an interested party, being unimpeached and uncontradicted, was binding on the Board and must be regarded as establishing these facts before this Court.

Chesapake & Ohio R. R. Co. v. Martin, 283 U. S. 209, 215, 220.

Chicago Ry. & Equipment Co. v. Blair, 20 Fed. (2d) 10, 12 (C. C. A. 7th).

Under *Mobile, J. & K. R. R. Co. v. Turnipseed*, 219 U. S. 35, if the rule of "first in first out" should be regarded as

merely establishing a "*prima facie* inference", such inference was at an end when petitioner proved his intention corroborated by the detail of the transactions.

That case involved the validity of a provision of the Mississippi Code which provided that (p. 41):

> "In all actions against railroad companies for damages * * * proof of injury inflicted by the runing of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable care and skill."

At page 43 the opinion, by Mr. Justice Lurton, reads:

> "The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing *some evidence* to the contrary. *When that is done the inference is at an end* and the question of negligence is one for the jury upon all the evidence."

Under the authority of this case, the Court below erred in holding that the presumption established by the regulation overcame the evidence given by petitioner, which, as noted above, was the only evidence available in the instant case and presumably in any other similar case.

CONCLUSION.

The petition for the writ of certiorari should be granted.

HENRY M. WARD,
Counsel for Petitioner,
Washington, D. C.

January 21, 1935.

APPENDIX A.

Analysis of Schedules (R. 25-28).

An examination of the purchases and sales from month to month, as stated in the Schedules, Exhibits B and C, (R. 25-28) shows that in nearly every instance the most recent purchases tallied with the immediately following sales.

Analysing Exhibit B, the Clothier Jones account, (R. 25-26) it appears that in February (6th and 9th) petitioner sold 400 shares at 113-112 and bought back 400 in March (9-21) at 117-120; that in April he bought 600 between 122 and 134 5/8 and from May 3-7 he bought 600 more shares on a rising scale from 137 to 148 and sold 1,000 shares May 10th at about 145. These sales greatly strengthened his position. On May 14th he bought 500 more at about 148. On the following days the market fell and he was forced to sell 500 shares May 18-23 at a loss of over 5 points. Thus his debit balance by the purchase and sale of these 500 shares was increased by only about $6,000. Thereafter by a fall in the market his margin was impaired, and on June 12, 13 he sold 800 shares on a falling market (139-131¼) but bought back 800 shares on June 15, 19 on a rising market (133 3/8-139). The result of these transactions was almost an even break. His debit on May 31st of $244,035.18 increased to $245,338.16 on June 18. In the meantime his "long" stock had increased by only 200 shares, from 2,300 March 31 to 2,500 June 30th. There were no transactions in July, August or September. On October 8th he bought 500 shares at 140¾ and on October 22nd sold 500 shares between 145½ and 146½, reducing his debit balance of $249,491.38 on September 29 to $246,528.14 on October 31. On November 5th he bought 500 shares at 146½. On November 16th 500 more at 161¼ increasing his debit balance to $403,403.14. On December 10-11 the market being off nearly 10 points, he sold 500 shares at 151-152 1/8. This purchase of 500 shares in November and sale of 500 in

December cost him nearly $10,000. His debit balance of $319,903.14 on November 5th was increased to $329,840.44 on December 11th. December 13-26 he bought 500 more shares at 157¼-162 and made no further purchases or sales. His "long" holdings of 2,500 shares on October 31st, (an increase of only 200 over the 2,300 held on January 1st) were increased by 1000 shares to 3,500 on December 31st, an increase for the year in the Jones account of 1,200 shares.

Similarly, analysing the MacDonald account, Exhibit C (R. 27-28); petitioner started on January 1st "long" 3,000 shares, with a debit balance of $283,168.64. January 16th he bought 100 shares at 116½. February 6th he sold 200 shares at 113 and February 9th 200 at 112, making 400 sold in February; March 9-12 he bought back 400 shares at 115 7/8-120½. The net result to March 31st was an increase from 3,000 to 3,100 shares and an increase of debit balance from $283,168.64, January 1st, to $297,938.74, March 31st. In April, on a rising market, petitioner bought 600 shares at 122½-134. May 3rd-8th he bought 600 more at 137-148. These purchases increased the debit balance from $297,938.74, March 31st, to $460,337.54. Consequently, the margin being impaired, petitioner on May 10th sold 1,000 shares at 144 5/8-144¾ and on May 11th 500 more at 146. As the result of these transactions petitioner's "long" account was reduced from 3,700 shares April 30th to 2,800 shares May 11th and his debit balance was reduced from $374,487.54 to $243,205.04. With his 2,800 shares at the quotation of 146 he had a credit equal to $408,800. The debit of $243,205.04 is 70 per cent of $347,421.48, so petitioner had a surplus credit of over $61,000. Accordingly on May 14 he bought 500 shares at 147¼-147 3/8 and on May 25th 200 shares more making him long 3,500 shares on May 31st with a debit balance of less than 70 per cent of the market quotations. In June, his margin being impaired, he sold 800 shares June 12-13 on

a falling-market (139-131) decreased his holdings to 2,700 shares and his debit balance from $247,968 on May 31st to $240,034 June 13th. These sales brought his debit balance below 70 per cent of the current quotation, so, on June 14-18 he bought back 800 shares on a rising market from 134 5/8 to 139. His holdings were thus restored to 3,500 shares. His debit balance, which had been $347,968 on May 31st was increased to $349,384. On June 21st, the market being off and his margin impaired, he sold 500 shares at 133 and reduced his debit balance to $283,519. On June 29th he bought 200 shares at 135 7/8. As his debit balance was less than 70 per cent of the market quotation he was able to buy 300 shares more July 2-5 at 137-138. This brought his "long" account on July 31st to 3,500 shares and his debit balance to $353,152.96. He did not operate in August, but September 14th sold 1,000 shares at 142¾-143 7/8. This sale reduced his debit balance to $212,766.23 and his long account to 2,500 shares. On October 3d he bought back 1,000 shares at 141, made no further sales, and, in November bought 1,000 more shares on a sharp rise at 156½-168. There were no purchases or sales in December and on December 31st his account stood "long" 4,500 shares, debit balance $525,527.99.

From this analysis on the year's transactions, assuming that the market quotation was 160 on December 31st, 1928

and 115 on January 1st, his accounts with the two brokers stood as follows:

1928 Dec. 31 "long" 8,000 shares at 160 (approximate market quotation).....	$1,280,000.00
Less total debit balances both brokers	932,822.67
"Paper profit" on all transactions 1928 and prior years.....	$347,177.33
Jan. 1 "long" 5,300 shares at 115 (approximate market quotation)	$609,500.00
Less total debit balances both brokers	501,865.59
Paper profit years prior to 1928.....	$107,634.41
Hence the "paper profit" for 1928 was, the total profit to December 31, 1928, as above.....	$347,177.33
less the paper profit as at Jan. 1, 1928, as above.....	107,634.41
Making the "paper profit" for 1928..	$239,542.92

These "paper profits", being mere increments of value in securities held, were of course not taxable. The Commissioner, however, by applying the rule of "first in, first out", computed an *actual profit,* realized by sales, of (R. 22) $192,143.25, only some $47,000 less than the non-taxable "paper profit" for the year. Indeed by taking the market value of shares on hand January 1, 1928, at a few points higher than the assumed 115 and on December 31, a few points lower than the assumed 160, the actual profit for the year determined by the Commissioner would be greater than the non-taxable "paper profit".

APPENDIX B.

SNYDER V. COMMISSIONER, PETITIONER'S RECOMPUTATION OF TAX 1928.

(Illustration only, based on return, not printed, and Exhibits B and C, R. 25-28, and on Appendix A, analysis of transaction above, pages 26-29)

1. Computation of net taxable income.

1	Salary			$5,500.00
2	Commissions, etc.			554.18
3	Profit on sales of stock (a) Clothier Jones account (Exhibit B, R. 25-26) 1928 bought 3700 shares U. G. I. at following prices:			
	Shares 1600 for	$209,975.00		
	Shares 1300 for	183,300.00		
	Shares 800 for	84,775		
	3700 shares bought for	$478,050.00		
	1928 Sold 3700 shares for		$516,313.50	
	Less price paid above		478,050.00	
	Profit on Clothier Jones account			38,263.50
	(b) MacDonald & Co. account (Exhibit C, R. 27-38) 1928 total shares bought 5700 for		806,687.50	
	Less price paid for last 1500 shares, viz:			
	Nov. 2 500 shares	84,125.00		
	Nov. 8 500 shares	78,375.00		
	Oct. 3 500 shares (1½ of 1000)	70,625.00		
	Total deduct for 1500 shares	233,125.00	233,125.00	
	Net paid for 4200 shares		$573,562.50	
	1928 Sold 4200 shares for		$578,991.00	
	Less purchase price as above		573,562.50	
	Profit on MacDonald account			5,428.50
	Add dividends			33,363.55
	Gross income			$83,109.73
	Deduct interest paid brokers			43,427.63
	Net taxable income			$39,682.10

Computation of tax			
Normal tax			
Net taxable income as above	$39,682.10		
Less dividends as above	33,363.55		
Balance subject to normal tax	6,318.55		
Subject to 1½%	4,000.00	60.00	
Balance to 3%	2,318.55	69.56	
Total normal tax			129.56
Surtax			
Net taxable income above	$39,682.10		
Surtax on	36,000.00	1,400.00	
Balance at 10%	3,682.10	368.21	
Total surtax			1,768.21
Total tax 1928			$1,897.77